

Gregory P. Stone (SBN 078329)
Andrea Weiss Jeffries (SBN 183408)
Fred A. Rowley, Jr. (SBN 192298)
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
Email: gregory.stone@mto.com
Email: andrea.jeffries@mto.com
Email: fred.rowley@mto.com

Peter A. Detre (SBN 182619)
Carolyn Hoecker Luedtke (SBN 207976)
Rosemarie T. Ring (SBN 220769)
Jennifer L. Polse (SBN 219202)
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
Telephone: (415) 512-4000
Facsimile: (415) 512-4077
Email: peter.detre@mto.com
Email: carolyn.luedtke@mto.com
Email: rose.ring@mto.com
Email: jen.polse@mto.com

Attorneys for RAMBUS INC.

Rollin A. Ransom (SBN 196126)
SIDLEY AUSTIN LLP
555 West Fifth Street, Suite 4000
Los Angeles, CA 90013-1010
Telephone: (213) 896-6000
Facsimile: (213) 896-6600
Email: rransom@sidley.com

Pierre J. Hubert (Pro Hac Vice)
Craig N. Tolliver (Pro Hac Vice)
McKOOOL SMITH PC
300 West 6th Street, Suite 1700
Austin, TX 78701
Telephone: (512) 692-8700
Facsimile: (512) 692-8744
Email: phubert@mckoolsmith.com
Email: ctolliver@mckoolsmith.com

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

HYNIX SEMICONDUCTOR, INC., et al.,

Plaintiffs,

vs.

RAMBUS INC.,

Defendant.

CASE NO.: CV 00-20905 RMW

**BRIEF OF RAMBUS INC. IN
OPPOSITION TO HYNIX'S MOTION FOR
STAY OF EXECUTION OF MONEY
JUDGMENT AND FOR PERMISSION TO
POST ALTERNATIVE SECURITY**

[PUBLIC REDACTED VERSION]

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I. INTRODUCTION

The bond motion filed by Hynix (the “Motion”) is remarkable not for what it says, but for what it does *not* say. Hynix never claims that there was no surety willing to offer a full supersedeas bond on any terms.

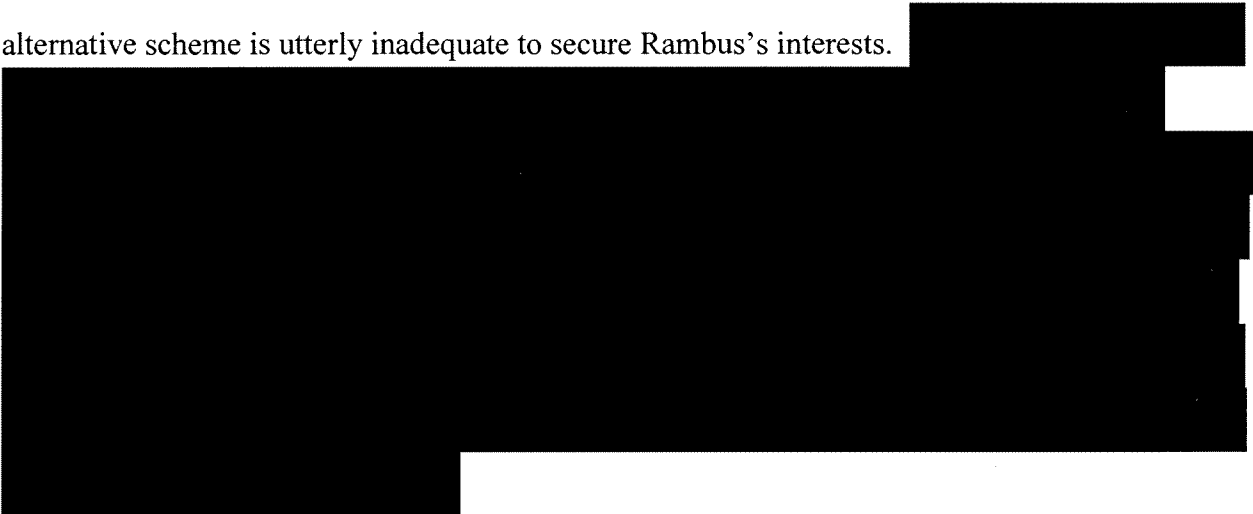
. And it does not say that its creditors rejected any specific efforts to fund a full bond. Instead, Hynix’s brief carefully frames its efforts, alleging that Hynix “believes” (but does not know) it cannot obtain a full bond and that such a bond is “effectively” (but not actually) unavailable. (Mot. at 10-11.)

This makes obtaining a full bond an “extraordinary challenge” (but not an insuperable one). (*Id.* at 2.)

Hynix’s unwillingness to show, or even say, that it cannot obtain a bond is curious, but is ultimately explained by the things that Hynix *has* said elsewhere about its finances and business. In earnings calls, statements to the press, and financial statements, Hynix has indicated that it has ample financial resources despite the “conditions in the DRAM industry” and the “severe contraction” in the credit markets. (Mot. at 10, 2.) Hynix has stated that it expects DRAM prices to *rise* in the coming year, and that it will return to profitability. It has taken the position with investors that the same DRAM bankruptcies it laments in its brief will *strengthen* the company’s overall position in the DRAM market. Consistent with these predictions, Hynix is reportedly making massive capital investments and raising its DRAM prices; its stock price has soared since January; and just this week, it announced a plan, approved by its creditors, to raise \$889 million in new financing.

All of these resources can and should be brought to bear to satisfy the bond in this case. That Hynix has not done so—and that its executives do not even mention them in their supporting declarations—indicates that Hynix simply does not want to pay for a full bond. This is not a legitimate reason to waive the bond requirement in Rule 62. Because that requirement serves to ensure that an appeal will not compromise a prevailing party’s ability to collect on a judgment, it

1 is waived only in “extraordinary circumstances.” *HCB Contractors v. Rouse & Assocs.*, 168
2 F.R.D. 508, 512 (E.D. Pa. 1995) (citations omitted). Hynix’s Motion fails this standard, not only
3 because it has made no showing that a bond would be impracticable, but also because its
4 alternative scheme is utterly inadequate to secure Rambus’s interests.



12 Finally, Hynix has failed to satisfy the requirements for staying the forward-looking
13 royalty ordered by this Court, whether in the form of accrual or payments into escrow. A
14 compulsory license entails, as its defining feature, the obligation to pay the *patentholder* royalties.
15 To obtain relief from that duty, Hynix must demonstrate, *inter alia*, a likelihood of success and
16 irreparable harm. Because it cannot make this showing, the Court should adhere to its judgment
17 and order Hynix to pay royalties directly to Rambus. At a minimum, it should order Hynix to pay
18 the royalties into escrow. Allowing Hynix to continue infringing while retaining the royalties it
19 owes would effectively set Rambus’s exclusivity rights at naught; those payments are the only
20 way, short of an injunction, of vindicating Rambus’s patent rights for their remaining life.

21 **II. STATEMENT OF FACTS**

22 Hynix’s factual presentation focuses on two issues raised by its obligation to post a bond:
23 (1) Hynix’s current financial condition; and (2) the state of the DRAM industry, and the future
24 prospects for both that industry and Hynix itself. Although Rambus bears no burden on any of
25 these points, *see Poplar Grove v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979),
26 Rambus sets forth the following to provide the Court with a more complete picture of the facts:

1 **A. Hynix's Current Financial Condition**

2 In setting out Hynix's financial condition, Hynix Treasurer Yoo Ho Roh focuses on its

3 [REDACTED]
4 [REDACTED]
5 [REDACTED] But Hynix's financial statements and public statements, as well as news reports,
6 shed light on the *current* state of its finances. These sources indicate that Hynix is in stronger
7 financial health, with more resources at its disposal, than Mr. Roh suggests:

8 First, the price of Hynix stock has increased by 64.5% in the first three months of this
9 year. (Jacobs Decl. ¶ 24.)¹ When share prices rise, it is easier for a company to raise money
10 through equity, because existing shareholders suffer less dilution. (*Id.*) Indeed, Hynix just
11 recently announced plans to raise an additional \$520 million through a rights offering. (Wu
12 Decl.², Ex. A (Hynix Set to Raise Cash from Bourse, *Korea Times*, Apr. 9, 2009).)

13 Second, Hynix's cash on hand may be replenished by its revenues. [REDACTED]
14 [REDACTED]

15 But Hynix took in \$567.9 million in accounts receivable even in the fourth quarter (Jacobs Decl.
16 ¶ 19), at the end of what Hynix has called "the worst year for the memory market" (Wu Decl., Ex.
17 B (Transcript of FY 2008 Earnings Call, February 4, 2009) at 2). Hynix itself has given good
18 reason to expect that its cash reserves will stabilize this year, as the company has forecast both
19 higher DRAM prices and a return to profitability. (*See* discussion *infra* at 7-12.)

20 Third, [REDACTED] news reports
21 indicate that it recently obtained approval from creditors to raise \$889.9 million, including the
22 aforementioned rights offering. (Wu Decl., Ex. C (Hynix May Raise \$ 900 mln in 2009, Reuters,
23 Apr. 8, 2009); *see also* Wu Decl., Ex. B.) [REDACTED]

24 [REDACTED] Evidently, Hynix's own creditors continue to have
25 confidence in the company.

26
27 ¹ Dr. E. Allen Jacobs is Rambus's expert on surety bonds. His declaration is concurrently filed
with this brief.

28 ² Declaration of Jeffrey Y. Wu in support of this brief, filed concurrently.

Fourth, Hynix recently announced further steps to shore up its financial position. On its February 4, 2009 earnings call, Hynix's Senior Vice President for External Relations, O.C. Kwon, announced that the company planned to generate approximately \$750 million from the sale of non-core assets this year. (Dwyer Decl. ¶ 6;³ *see also* Wu Decl., Ex. B at 8.) Mr. Kwon stated that "we are in process to sell the remaining tools from ... three fabs, Eugene, Incheon and Cheongju"—[REDACTED]. (Wu Decl., Ex. B at 8.) "[W]e are trying to sell them off as soon as possible," Mr. Kwon explained. (*Id.*)

B. The Outlook for the DRAM Industry and Hynix's Business

In its Motion, [REDACTED]

But Hynix's statements to investors and recent news reports paint a rather rosier picture.

In Hynix's recent earnings call, Mr. Kwon stated: "[W]e are encouraged by recent signs of recovery in memory prices which we hope can lead to an improved pricing environment in memory market over time, thus proving the worst of the market downturn has passed." (Wu Decl., Ex B. at 2.) Hynix has publicly stated that it believes industry conditions bottomed out in the fourth quarter of last year. (Jacobs Decl. ¶ 26; *see also* Wu Decl., Ex. D (Hynix Says Chip Slump Hit Bottom, *Wall Street Journal*, Mar. 27, 2009).) Indeed, the Korean business press has recently reported that Hynix has *already* begun negotiating with its bigger clients to raise contract chip prices by 10-20 percent. (*Id.*; *see also* Wu Decl., Ex. A.)

The reason Hynix has been able to raise prices is, ironically, the very bankruptcies and consolidations [REDACTED]. The failure of weaker firms will reduce supply, raising prices and lifting the prospects of those firms that survive. (Jacobs Decl. ¶ 27.) Hynix's CEO, Kim Jong-kap, has stated that industry "restructuring is expected to take place," and that "[o]ut of around 10 players, three or four of those are likely to be reduced this year." (*Id.*; *see also* Wu Decl., Ex D.) As Hynix explained to investors, "ongoing consolidation of the

³ Robert Dwyer, a certified public accountant, is Rambus's expert on financial analysis. His declaration is concurrently filed.

1 industry will constrain supply growth further and ultimately lead to a better balance of demand
 2 and supply in the second half this year.” (Wu Decl. Ex. B, at 2.) Nor is this merely the subjective
 3 view of Hynix. Many analysts have predicted that the restructuring of the industry will benefit
 4 firms like Hynix. (Jacobs Decl. ¶ 27 (“DRAM prices have steadily soared on hopes of
 5 improvement among chip suppliers after Germany’s Qimonda filed for insolvency. ... Samsung
 6 and Hynix will be winners when the swirl ends.”); *see also* Wu Decl., Ex. E (Investors Returning
 7 to Samsung Electronics, Hynix, *Korea Times*, Feb. 9, 2009).)

8 **III. ARGUMENT**

9 **A. Hynix Has Not Satisfied, and Cannot Meet, its Burden to Show that the Full 10 Supersedeas Bond Is Impracticable and that its Proposed Security Arrangement Adequately Protects Rambus**

11 Hynix’s entire brief is written as though its burden were merely to make a showing of
 12 *some* difficulty or challenge in obtaining a supersedeas bond, leaving it to Rambus to explain why
 13 Hynix can in fact afford the appeal it wishes to take. We are told that “the economic environment
 14 generally” is bad (Mot. 10, 6-7), that the DRAM industry “is in serious financial difficulty” (*id.* at
 15 7), and that the credit markets are tight (*id.* at 1). Based upon these general observations, Hynix
 16 asserts that it faces an “extraordinary challenge” in obtaining a bond, [REDACTED]
 17 [REDACTED]. Never mind that Hynix does not
 18 actually profess an inability to meet those terms, and that Hynix alone possesses the data and
 19 evidence that would definitively back up or refute such a claim. As Hynix would have it, [REDACTED]
 20 [REDACTED], so it is for *Rambus* to prove that a bond
 21 is practicable.

22 That is not the law. Rule 62, and the principles developed in applying it, require more
 23 before a court will expose an appellee to the inherent risk of an alternative security. Although a
 24 trial court has the authority to waive Rule 62’s bond requirement, *see Int’l Telemeter Corp. v.*
 25 *Hamlin Int’l Corp.*, 754 F.2d 1492, 1495 (9th Cir. 1985) (payment of full amount of judgment
 26 into an escrow account accepted as alternative to posting a supersedeas bond), that authority “has
 27 been exercised only in ‘extraordinary circumstances,’ and only where alternative means of
 28 securing the judgment creditor’s interest were available.” *HCB Contractors*, 168 F.R.D. at 512

(citations omitted). The caselaw is uniform that the appellant has the burden to “objectively demonstrate” the reasons for “depart[ing] from the usual requirement of a full security supersedeas bond.” *Poplar Grove*, 600 F.2d at 1190, *cited in Int’l Telemeter*, 754 F.2d 1495. Accordingly, when, as in this instance, the appellant seeks relief on the ground that it is unable to obtain a bond sufficient to cover the judgment, it must show (1) that “posting a full bond in impossible or impracticable”; and (2) that an alternative plan “will provide adequate (or as adequate as possible) security for the appellee.” *HCB Contractors*, 168 F.R.D. at 512 (citation omitted); *accord, e.g., Bolt v. Merrimack Pharm., Inc.*, 2005 WL 2298423, at *3-*4 (E.D. Cal. Sept. 20, 2005). The burden rests, at every point in the analysis, with Hynix and Hynix alone.

Under these standards, Hynix’s arguments and half-hearted factual showing fail. Hynix’s evidence, when supplemented with public information omitted by Hynix, does not jibe with the Motion’s [REDACTED]. The facts instead suggests that Hynix has both ample financial resources and a range of options to obtain a bond. There is accordingly no justification to resort to Hynix’s alternative scheme, which would saddle Rambus with assets of dubious value and liquidity.

1. Hynix’s Factual Showing Fails to Demonstrate that a Full Bond is Impracticable or Impossible, and Raises More Questions than it Answers About Hynix’s Finances

In its motion, Hynix is careful not to say that it has been denied a bond sufficient to cover the \$400 million judgment.⁴ The most that Hynix says is that the Court ought to relieve it of the bond requirement in Rule 62 because it is “impracticable” to secure a bond. (Mot. at 2-3.) But far from showing an inability to finance a full bond, Hynix’s factual submissions, coupled with its public statements about its business and finances, suggest that Hynix either has not tried hard enough or is unwilling to pay the going rate. While portraying the DRAM industry and its own finances as a shambles, Hynix has publicly suggested that things are looking up in the industry and that it expects 2009 to be a “turning point” for the company. (Wu Decl., Ex. B at 2.) Hynix’s

⁴ Because “a supersedeas bond ‘must normally be in a sum sufficient to pay the judgment and costs, interest, and damages for delay,’” the bond required here would actually be larger than the \$400 million bond Hynix assumes. *E.g., Cashman Equip. Corp. v. U.S. Fire Ins. Co.*, 2008 WL 5000355 (E.D. Pa. Nov. 21, 2008) (citation omitted).

1 explanation of its efforts to secure a bond is chock full of holes,

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3
4
5
6 **2. Hynix's Own Public Predictions and Financial Statements Suggest the**
7 **Portrayal of Desperation in its Motion is Overwrought**

8 Two of the main factors that, according to Hynix, are hamstringing its effort to get a bond
9 are the state of the DRAM market and Hynix itself. (Mot. at 4, 6-7.) The thrust of this argument
10 is that the “historically low” price of DRAMs has hurt Hynix’s revenues and compromised its
11 capital structure. (*Id.*) But whether or not Hynix has *generally* fallen on hard times is beside the
12 point; the question here is whether Hynix, having been found liable to Rambus for \$400 million
13 in patent damages, can arrange to bond that amount through equity or debt. On that particular
14 financial issue, Hynix’s own public representations and financial statements refute the company’s
15 impracticability contentions.

16 Whatever the future prospects for the DRAM industry as a whole, Hynix has itself made
17 statements indicating that it is weathering the difficult conditions in the DRAM market, and that it
18 has managed to maintain financial stability. Hynix has publicly declared that it “does not expect
19 that the judgment will have *any impact on its business operations*,” (Dwyer Decl. ¶ 8; Wu Decl.
20 Ex. O (Hynix Press Release, Mar. 11, 2009) (emphasis added)), suggesting that it has the
21 financial resources to continue litigating this case on appeal—including, presumably, the
22 resources required to post a bond. That declaration resonates with the statements Hynix made
23 about its financial condition in its most recent earnings call. Hynix executive O.C. Kwon
24 observed that, during the down-turn in the DRAM market, Hynix achieved “financial stability
25 through additional financing.” (Wu Decl, Ex. B, at 2.) In response to questioning, Mr. Kwon
26 explained that Hynix had been able to secure sufficient support from Korean banks, and
27 accordingly had not yet resorted to international financing: “We haven’t tried yet to tap other
28 [non-Korean] sources of financing while our credit banks have been cooperative to rendering the

1 additional funding to us.” (*Id.* at 13.) When asked whether Hynix planned to seek additional
 2 financing, Mr. Kwon responded that the company had no immediate need for “more safety
 3 cushion,” but that it was “constantly reviewing various options for further funding ... to endure
 4 the possibly prolonged market downturn.” (*Id.*)

5 Mr. Kwon’s suggestion that Hynix is financially stable is borne out by the company’s
 6 publicly reported data. The market value of the company’s stock is estimated to be \$4.9 billion as
 7 of April 3, 2009. (Jacobs Decl. ¶ 25.) By any measure, Hynix’s financial resources are
 8 substantial:

9 *Cash on Hand:* As of December 31, 2008, Hynix reported approximately \$570 million in
 10 cash, cash equivalents, and short-term financial instruments. (Dwyer Decl. ¶ 3 [REDACTED]
 11 [REDACTED], Hynix’s most recent
 12 financial statements indicate that it had \$567.9 million in accounts receivables in Q4 2008.
 13 (Jacobs Decl. ¶ 19.) More importantly, Hynix’s revenues are likely to increase with the price
 14 increases it anticipates. (*Id.*)

15 *Equity Issuances:* [REDACTED]

16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED] Indeed, Hynix
 19 plans to raise just that amount through a new rights offering plan announced just this week.
 20 (Jacobs Decl. ¶ 30.)

21 *Debt Issuances:* [REDACTED]

22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 *Hard Assets:* [REDACTED]

27 ⁵ As Mr. Dwyer has explained, these figures reflect Dollar/Won conversion rates as of Apr. 9,
 28 2009. (Dwyer Decl. ¶6 n.3.)

As Rambus's surety bond expert has concluded (Jacobs Decl. ¶ 32), these resources suggest that Hynix is more than able to obtain a bond for the full amount of the judgment. *Cf. Feldman v. Philadelphia Housing Authority*, 1994 WL 46514, at *3 (E.D. Pa. 1994) (requiring bond where defendant "represent[ed] it ha[d] sufficient funds it [could] set aside in order to provide some security for payment"). The company has more in cash on hand than the judgment itself, and its revenues should trend upward if its price projections prove correct. This suggests Hynix could pay off the entire award in cash.

and it has concrete plans to raise hundreds of millions of dollars more through financing and the sale of assets. That ought to give the company ample breathing room to fund its operations while securing the bond necessary for its appeal.

In describing Hynix's financial condition, Hynix Treasurer Yoo Ho Roh fails to address or even acknowledge many of these resources. Mr. Roh takes no account of Hynix's recent jump in share price and business recovery.

But

Mr. Roh makes no mention of the \$889 million in *additional* financing that Hynix now expects to raise, casting considerable doubt on his assertion that

If

Hynix's creditors are willing to issue Hynix debt or take an equity stake in order to fund capital improvements or manufacturing operations, they should be willing to extend Hynix financing in order to meet legal obligations attending those same core activities. And if, as Mr. Kwon suggests, Hynix has yet to tap into financial resources outside Korea, the bond that Hynix must post to continue litigating this case would seem an appropriate occasion to pursue that option.

1 It is incumbent upon Hynix, as the party with the burden, to explain why it cannot afford
 2 to obtain a bond. An essential part of that showing is Hynix's financial condition. *See, e.g.,*
 3 *Bethel v. McAllister Ros., Inc.*, 1994 WL 230740, at *1 (E.D. Pa. May 19, 1994) (noting that the
 4 court ordered the party seeking a bond waiver "to submit financial documentation reflecting the
 5 company's revenues and assets"). What Hynix has submitted, however, is an account of its
 6 financial resources that is both incomplete and inconsistent with its own public statements. Based
 7 upon Hynix's submissions, there is no way to tell, with confidence, what resources the company
 8 can actually bring to bear to obtain a bond. Even with its current leveraged position, Hynix has
 9 not demonstrated that it could not use its credit and assets to fund \$400 million in financing on
 10 *some* terms, which suggests Hynix simply has not found terms it likes. The deficiency alone
 11 forecloses any relief from Rule 62's bond requirement, for it leaves Rambus and the Court
 12 without the full context needed to evaluate Hynix's purported efforts to find a surety. But the
 13 company's cry of prohibitive financial distress is even more questionable in light of its
 14 contradictory positions regarding the prospects for the DRAM industry and its own business.

15 While there is no question that oversupply has placed price pressure on DRAM
 16 manufacturers over the past two years, the industry has long been marked by cyclical swings in
 17 price and thus profitability. (*See, e.g.,* Wu Decl. Ex. G (Effort to Curb Illegal Electronics
 18 Devices, *Idaho Statesman*, July 23, 2008 (noting "the brutally cyclical computer-memory
 19 market").) In its most recent earnings call, Hynix predicted that industry is at the verge of a
 20 cyclical upswing: "[W]e are encouraged by recent signs of recovery in memory prices which we
 21 hope can lead to an improved pricing environment in memory market over time, thus proving the
 22 worst of the market downturn has passed." (Wu Decl. Ex. B, at 2.)

23 In addition to noting the prospect of price stability, Hynix's O.C. Kwon stated "we hope
 24 year 2009 is another turning point for Hynix," promising to "focus on technology and cost
 25 competitiveness." (*Id.*) Hynix is already negotiating to raise contract chip prices by 10-20%
 26 (Jacobs Decl. ¶ 26), while aiming to double its share of the global mobile DRAM market this year
 27 (*id.* ¶ 27). Because Hynix appears poised to survive the recession and grow, it could emerge with
 28 a *stronger* position in the DRAM market as competitors like Qimonda declare bankruptcy and

1 production capacity drops. (Jacobs Decl. ¶ 27.) Indeed, Hynix has noted that the elimination of
 2 DRAM firms could lead to constricted supply, higher prices, and better results for Hynix in 2009.
 3 (Wu Decl., Ex. D.) That statement directly contradicts Hynix's suggestion that the difficulties
 4 faced by other DRAM firms bode ill for it. (Mot. at 7.)

5 To the extent Hynix's prospects for recovery may remain less than certain, that
 6 uncertainty cuts *against* relief from the bond requirement. The entire point of a bond is to ensure
 7 that Rambus can collect the judgment it has won. *See, e.g., NLRB v. Westphal*, 859 F.2d 818, 819
 8 (9th Cir. 1988) ("The posting of a bond protects the prevailing plaintiff from the risk of a later
 9 uncollectible judgment...."). So long as Hynix can obtain a bond without falling into bankruptcy
 10 or crippling its business—and there is every reason to believe it can (*see infra*)—then the fact that
 11 things may not improve as much as Hynix predicted to investors weighs in favor of giving
 12 Rambus the secure protection of a bond now. After all, by Hynix's own estimate an appeal is
 13 likely to take two years. (See Hynix's Mot. for Summ. J. and for Stay at 8, filed Jan. 19, 2009.)

14 **3. Hynix Has Not Shown that it Has Explored or Pursued All Potential**
 15 **Means for Obtaining a Bond**

16 Shorn of its rhetoric, Hynix's impracticability theory reduces to the contention that "a full
 17 supersedeas bond is effectively unavailable" because [REDACTED]

18 [REDACTED]
 19 That showing is inadequate on its face, because it does not even *purport* to
 20 establish that Hynix cannot actually secure a bond. [REDACTED]

21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED] And it ignores other possible avenues for
 25 supporting a bond, including options suggested by Hynix's own papers.

26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

[REDACTED]

Based upon Hynix's current financial condition, there is every reason to believe that it *could* obtain the required Letters of Credit or equivalent collateral, even if it means paying a higher rate. There is no inherent difference between raising general corporate funds and posting a

1 supersedeas bond. (*See* Jacobs Decl. ¶¶ 16-22.) In either situation, the investor or surety is
 2 looking for assurance that it will be repaid, based on the company's assets and cash flow.
 3 Hynix's prodigious fundraising activities provide clear evidence that it could raise the funds to
 4 obtain a \$400 million bond. Hynix has stated that it expects higher DRAM prices and a return to
 5 profitability, which should shore up its cash reserves. Indeed, if the company's \$567.9 million in
 6 accounts receivables from Q4 2008 are not encumbered, it could securitize those funds to get a
 7 letter of credit or bond. (Jacobs Decl. ¶ 19.) The company's rebounded stock price and market
 8 cap should permit it to raise funds by issuing new stock. (*Id.* at ¶ 17.) [REDACTED]
 9 [REDACTED] and just obtained approval to raise \$889
 10 million more also confirms that it has not exhausted its financing options. [REDACTED]
 11 Dwyer Decl. ¶ 8.) Indeed, Hynix itself acknowledged on its recent earnings call that "[w]e
 12 haven't tried yet to tap other sources of financing." (Wu Decl., Ex. B at 13.)

13 [REDACTED]
 14 [REDACTED]. If, as Hynix claims, these properties "provide[]
 15 Rambus with adequate security" (Mot. 13), Hynix should be able to mortgage the properties and
 16 use the proceeds to obtain a Letter of Credit. *Cf. Willis v. Celolex Corp.*, 978 F.2d 146, 148 (4th
 17 Cir. 1992) (defendant purchased certificates of deposit that it pledged to a bank, which then
 18 issued Letters of Credit for a surety's use). That Hynix has not drawn on the value of these
 19 properties suggests either that the properties are not as valuable and Hynix claims or that Hynix is
 20 not seriously pursuing all its options.

21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]. Hynix could,
 24 for example, post shares or its fabs directly with the bonding company. (Jacobs Decl. ¶ 15.) It
 25 could take the cash proceeds from a combination of equity offers, debt offerings, accounts
 26 receivable, and mortgages and post those proceeds. (*Id.*) It could deposit those proceeds with an
 27 escrow agent acting as an intermediary. (*Id.*) [REDACTED]
 28 [REDACTED]

1 [REDACTED] That Hynix might
2 need to pay more in fees or a higher aggregate rate for these arrangements does not render them
3 impossible or impracticable.

4 The only reasonable inference from Hynix's factual presentation is not that Hynix *cannot*
5 obtain a bond, but that it prefers to spend its money on other things. That is simply not a
6 legitimate basis for relief from Rule 62's bond requirement.

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1. The Liens Proposed by Hynix Are Too Dubious in Value and Too Cumbersome to Give Rambus Any Meaningful Security

The law is clear that “[c]ourts will deny a motion to stay when the movant does not propose a plan that will provide adequate alternate security.” *Key Corp. Capital, Inc., v. Tilley*, 2005 WL 182707, at *1 (E.D. Pa. Jan. 27, 2005); *see also Bank of Nova Scotia v. Pemberton*, 964 F. Supp. 189, 192 (D.V.I. 1997) (refusing to waive bond requirement because the defendant “utterly failed to satisfy his burden of proposing a plan to provide adequate alternate security for

1 the prevailing parties”). Because the supersedeas bond provided in Rule 62 is essentially a
 2 “judgment insurance policy,” *Townsend v. Holman Consulting Corp.*, 881 F. 2d 788, 797 (9th
 3 Cir. 1989), an alternative security must be sufficiently reliable and executable to serve that
 4 purpose. The foreign property liens proposed by Hynix cannot serve that purpose for two
 5 reasons: their value is too uncertain and contingent, and they are too burdensome to enforce.

6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED] Rambus is not a real estate firm. It has no
 10 familiarity with the commercial real estate market. What limited knowledge it has about Korea’s
 11 property laws it has acquired, through considerable expense, from its Korean lawyers [REDACTED]

12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 Hynix’s own security proposal confirms that there is reason for both the Court and
 19 Rambus to be concerned [REDACTED]

20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED] The difficulty faced by courts and appellees in assessing the value of property
 24 should give it pause in accepting it as security. In the case featured by Hynix, *Olympia*
 25 *Equipment*, Judge Easterbrook explained in his concurrence why the fair and efficient approach
 26 instead is to require the appellant to mortgage that property to a bank. Although, he noted, the
 27 appellant “asserts that the security it has posted with the district court will assure payment,” the
 28 “district court cannot easily verify this claim. A bank or bonding company would do better.” 786

1 F.2d at 801. Because they “have the benefits of expertise and ready access to information” as
 2 well as “the spur of self interest,” it is “[f]ar better to have the valuation and monitoring function
 3 performed by specialists than to have them performed by a district judge.” *Id.*

4 Although the *Olympia* Court ultimately upheld the alternative security arrangement there,
 5 the property at issue was apparently in the United States. *See* 786 F.2d at 801 (real property,
 6 microwave equipment, and satellite transponders worth five times the judgment). No mention
 7 was made of foreign proceedings, and *Olympia*’s authorizing judge (Posner) has elsewhere
 8 expressed concerns about procedural obstacles to enforcing such security. *See Lightfoot v.*
 9 *Walker*, 797 F.2d 505, 507 (7th Cir. 1986). The Seventh Circuit modified the security to reach
 10 the defendant’s corporate parent, and mitigated the risk by accelerating the appeal. *Olympia*, 786
 11 F.2d at 801. The risks identified by Judge Easterbrook in *Olympia* are present to an even greater
 12 degree here. What Hynix proposes is a lien on *commercial* real estate, used for a “reeling”
 13 DRAM business (Mot. at 2), in a *foreign* market, at a time of “severe” financial dislocation (*id.*).
 14 Conversely, the fact-bound reasons for accepting the risks in *Olympia* do not obtain here.

15 [REDACTED] is also an inadequate security because the procedure for enforcing it
 16 in Korea “is not only cumbersome and time-consuming, but uncertain in outcome.” *Lightfoot*,
 17 797 F.2d at 506. To perfect and liquidate its lien, Rambus would have to pursue a complicated,
 18 multi-step administrative process. Before it would even have a valid lien, Rambus would need to
 19 (1) file a report with the Bank of Korea, backed by a detailed valuation of the property, and (2)
 20 register the mortgage with a Korean court. (Rhee Decl. at 2-4.) The registration process would
 21 require Rambus to pay taxes. (*Id.*) If it were necessary for Rambus to execute this lien, it would
 22 have to undertake a separate and even more arduous process. First, Rambus would need to file a
 23 petition for an *auction* with a Korean Court, which in turn would appoint an appraiser and
 24 investigator to report on the value of the property and the status of any liens. (*Id.* at 4-7.)
 25 Second, the Court would need to hold one or more auctions, with progressively lower asking
 26 prices, until a buyer is found. (*Id.*) Third, once the auction process yields a buyer, Rambus
 27 would have to participate in a distribution process, along with other lien holders. (*Id.*) That
 28 process would entail yet more taxes. (*Id.*)

1 The complex nature of the enforcement process, and the fact that it would take place
 2 abroad, alone weigh against accepting Hynix's alternative arrangements. In contrast to a
 3 supersedeas bond, which is simple to enforce, *Lightfoot*, 797 F.2d at 507, the lien Hynix proposes
 4 would require Rambus to incur additional costs and mire it in red tape for minimum of six months
 5 (Rhee Decl. at 9). Even then, Rambus could have no guarantee of receiving the full value of its
 6 interest in the properties. As the declaration of Rambus's Korean law expert shows, the auction
 7 process typically does not yield the appraised value of mortgaged properties even in the best of
 8 circumstances. (Chung Decl. ¶¶ 6-7.)⁶

9 The Korean court will typically set an initial bidding price based upon its valuation report.
 10 Because of the passage of time, that price may be considerably less than the value of the property
 11 at the time the lien was recorded. (Chung Decl. ¶¶ 6-7.) If there are no bidders on the asking
 12 price at the initial auction, the Korean court will hold a second auction, at which the minimum
 13 bidding price will be reduced by 20%. (*Id.*) Real property is rarely sold at the initial auction.
 14 (*Id.*) When, as in this instance, the property to be auctioned is commercial real estate, the pool of
 15 interested bidders is likely to be limited to companies from the same industry, making multiple
 16 auctions more likely and further depressing the price of the winning bid. (*Id.*)

17
 18
 19
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 21
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 23 This is not a situation, then, in which the alternative security proposed by the appellant
 24 provides a means "of paying judgments without substantial delay or other difficulty." *Dillon v.*
 25 *City of Chicago*, 866 F.2d 902, 905 (7th Cir. 1988). The proposed security instead is fraught with
 26 logistical difficulties and uncertainty, requiring Rambus to gamble with *half* its judgment against

27 ⁶ Jin Yeong Chung, a lawyer licensed to practice in Korea, is Rambus's Korean law expert on
 28 enforcing liens. His declaration is concurrently filed.

Hynix. *Cf. Lightfoot*, 797 F.2d at 507 (rejecting availability of payment by defendant where the state legislature would need to vote to appropriate it). On this score, the cases relied upon by Hynix are off the mark. In *C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F. Supp. 501 (E.D. Pa. 1973), a \$1.2 million judgment was secured by an arrangement in which the defendant corporation pledged *all* of its common stock, individuals pledged case and stock, and some of the defendants posted a \$100,000 bond. *Id.* at 520-21. A package of common stock, cash, and a bond cannot be compared, in liquidity or transparency, to a lien on foreign commercial property. And a critical aspect of the security arrangement upheld in *TWA, Inc. v. Hughes*, 515 F.2d 173, 177 (9th Cir. 1975), were requirements that the defendant maintain a net worth four times the balance of the judgment left by the bond. Hynix has opposed such restrictions (Mot. 12 n.9), and they could give Rambus little comfort anyway, as its recourse would ultimately be to assets of questionable value outside the United States.

2. Hynix's Alternative Security Would Unfairly Shift Risk to Rambus, Undercutting the Purpose of Rule 62

Hynix should not be permitted to shift to Rambus the risk and costs [REDACTED]. Assuming these properties have economic value, Hynix should have them assessed by a bank or surety and use the proceeds to provide Rambus with a reasonable security. Financial institutions are best positioned to [REDACTED], and can bring expertise "to bear in liquidating security if something should go wrong." *Olympia*, 786 F.2d at 802 (Easterbrook, J., concurring). "Banks are in the business of taking risks for a price," *id.*, and whatever fee Hynix must pay to translate these assets into an acceptable security is a cost that *Hynix* should properly bear if it intends to appeal.

If Rambus is made to take liens [REDACTED], it will have to bear all the risks and costs noted above. Because it lacks the expertise of a financial institution, both the risks and the costs of perfecting and liquidating the liens will be greater for Rambus than for a bank or surety. *Id.* ("Risk is more costly for the plaintiffs than it is for banks."). That result would be fundamentally unfair, as it would absolve Hynix of a burden it ought to bear under Rule 62. Nor has Hynix offered any indication that it would be willing to *compensate* Rambus for the risk.

“Letting plaintiffs bear the risk themselves, without compensation, transfers wealth from the plaintiffs to the other creditors.” *Id.* It also turns Rule 62 on its head, as the rule’s very purpose is to require appellants, as a condition of staying the judgment, to give appellees reasonable assurance that they will be able to collect the judgment. An appellant is not entitled to delay enforcement of a money judgment as of right; that is “a privilege” the appellant must pay for by posting a bond or giving comparable security. *Poplar Grove*, 600 F.2d at 1191 n.1. It also “provides compensation for those injuries which can be said to be the natural and proximate result of the stay.” *Hamlin v. Charter Twp. Of Flint*, 181 F.R.D. 348, 351 (E.D. Mich. 1998) (citations omitted). Under Hynix’s approach, however, it is the *appellee*, Rambus, that must compromise its money judgment in order to permit Hynix to stay execution pending appeal. And the only apparent justification for imposing this cost on Rambus is to save the *appellant*, Hynix, the expense of providing adequate security.

When it comes to supersedeas bonds, sauce for the goose is *not* sauce for the gander. Hynix, and only Hynix, has the obligation to secure the judgment. Because it has not offered a reasonable alternative, this Court should enforce the default bond requirement. In these circumstances, applying Rule 62 would not “penalize Hynix for exercising its right to appeal.” (Mot. at 13.) It follows directly from Hynix’s burden under Rule 62.

3. Any Alternative to a Full Bond Should Provide Rambus With a Reliable and Readily Enforceable Security Interest

If this Court elects to consider alternatives to a full bond, it should hold Hynix to proposals that give Rambus adequate security and are simple to enforce. *See Lightfoot*, 797 F.2d at 507. The following arrangements would satisfy these criteria and be acceptable to Rambus:

Option 1: A Bond of \$250 Million or Greater, With the Balance in Letters of Credit From Reputable American or International Banks.

[REDACTED]

The balance of the \$150 million can be made up with Letters of Credit from a AA-rated U.S. bank or the U.S. branch of a highly-rated international bank. As noted, there are a number of possible means by which Hynix could obtain acceptable Letters of Credit, even if it must pay more. Hynix could, for example, mortgage its fabs to banks or real estate firms and use the proceeds to obtain Letters of Credit.

Option 2: Bond of \$250 Million or Greater, with Balance in Cash Deposited with the Court or into Escrow. As an alternative to Letters of Credit, Hynix could deposit the balance of \$150 million in cash or short-term securities with the Court or into an escrow account. *Cf. Bolt*, 2005 WL 2298423, at *3 (upholding alternative security that called for the payment of money into escrow). Hynix could obtain the funds to make such a deposit by drawing on its cash (or cash equivalents), credit arrangements, fabs, or some combination of these assets.

C. Hynix Should Be Required to Pay the Forward-Looking Royalties Directly to Rambus or, At a Minimum, Into Escrow

Hynix's suggestion that the Court "[o]rder [a]ccrual of the [r]oyalties" (Mot. 17-19) is not only legally unfounded, but also nakedly unfair to Rambus. Like Hynix's other proposed methods of addressing the judgment, accrual would leave the money Rambus is owed in Korea, [REDACTED] And because Rambus's patents have nearly expired, allowing Hynix to continue to infringe Rambus's patents while "accruing" royalties would effectively treat the judgment of infringement as if it never happened. Consistent with precedent and basic fairness, the Court should require Hynix to pay the ongoing royalties Rambus directly,⁷ or at least into an escrow account.

⁷ The Court need not, and should not, decide now whether Rambus must repay royalties if Hynix prevails on appeal. (Mot. at 16.) That issue is one to be decided after the appeal, as was done in *Broadcom*. On the merits, however, Rambus contends that *Broadcom* was wrongly decided. It goes without saying that if a permanent injunction had issued here, and the parties had negotiated a license pending appeal, Hynix would not be able to recover money paid pursuant to that license even if it prevailed on appeal. Yet that situation is not meaningfully different from a compulsory license. Contrary to the *Broadcom* Court's reasoning, 585 F. Supp. 2d at 1189-90, the "compulsory" aspect of the license operates with respect to *Rambus*, which has been forced to

1 Although Hynix is correct that this Court “has the power” to permit Hynix to accrue the
 2 royalties it owes Rambus, the usual course is for an ongoing infringer to pay the royalties either
 3 directly to the patentholder or into an escrow account. *See Broadcom Corp. v. Qualcomm Inc.*,
 4 585 F. Supp. 2d 1187, 1188 (C.D. Cal. 2008) (paid directly); *Amado v. Microsoft Corp.*, 517 F.3d
 5 1353, 1356 (Fed. Cir. 2008) (escrow); *Paice LLC v. Toyota Motor Corp.*, 504 F.3d 1293, 1314
 6 (Fed. Cir. 2007) (escrow); *In re Hayes Microcomputer Prods., Inc. Patent Litig.*, 982 F.2d 1527,
 7 1544-45 (Fed. Cir. 1992) (escrow). Of these two, the default position is for the infringer to pay
 8 the royalties directly to the patentholder as a form of equitable relief. *Cf. Paice*, 504 F.3d at
 9 1313-15. Like Hynix’s “accrual” proposal, paying into escrow is a way of staying that relief, and
 10 is thus an exceptional course subject to the test set forth by the Federal Circuit in *Standard*
 11 *Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990). Indeed, although
 12 it now argues otherwise, Hynix has historically all but conceded that *Standard Havens* applies.
 13 (See Hynix’s Statement Re: Final Judgment at 6 (noting that the Federal Circuit has ordered “an
 14 escrow account for deposit of ongoing royalties during the pendency of the appeal, where an
 15 injunction has been stayed pending appeal” and citing *Standard Havens*).)

16 Under the *Standard Havens* test, Hynix plainly fails to establish that it is entitled to pay
 17 into escrow, let alone to accrue, the royalty payments that the Final Judgment requires be paid to
 18 Rambus. As to both forms of relief, Hynix has not satisfied the two most important of the
 19 *Standard Havens* factors. First, Hynix cannot make, and certainly has not made, “a strong
 20 showing that [it] is likely to succeed on the merits” in its appeal. *Id.* at 512. For example, the
 21 Court has already rejected Hynix’s request for reconsideration of its spoliation ruling, and Hynix
 22 offers no basis to conclude the Federal Circuit will have a different view. Likewise, there is a
 23 strong likelihood that the Federal Circuit will uphold this Court’s carefully drawn claim
 24 construction, since it has already considered many of the issues Hynix is likely to raise. *See*

25
 26 accept a license it otherwise might have rejected. Hynix’s decision to continue manufacturing
 27 infringing devices is voluntary. The purpose of a compulsory license is to guarantee that an
 28 infringer can continue using patented technology, not to alter the fundamental licensor/licensee
 relationship, under which money paid is the patentholder’s regardless of the ultimate outcome of
 the case.

1 *Rambus Inc. v. Infineon Techs. AG*, 318 F.3d 1081 (Fed. Cir. 2003). Hynix's other likely
2 appellate arguments fare no better.

3 Second, Hynix has not shown that it will be "irreparably injured" if it were required to pay
4 Rambus directly, rather than paying into an escrow account or setting aside the money. *Standard*
5 *Havens*, 897 F.2d at 512. Indeed, it is hard to see what such injury would be, since in any event
6 Hynix would not be permitted to use the money. There is nothing to suggest that Rambus would
7 be unable to repay the royalties following the appeal if so ordered (Mot. at 19), and "the potential
8 loss of the withholding tax paid to the Korean government" (*id.*) is entirely illusory: Hynix's
9 declarations contain *no indication whatsoever* that Hynix would be unable to recover the tax; to
10 the contrary, they state that "[a]ccording to Korean national tax law, within three years after the
11 payment of the withholding tax, Hynix can request a refund." (Sa Decl. ¶ 6.)⁸ Rambus's Korean
12 tax law expert, a former judge and Korean National Tax Service lawyer, has explained that the
13 procedure is straightforward, and that Hynix can be confident it would recover any taxes withheld
14 on payments ultimately returned to Hynix. (Kwon Decl. ¶ 3.) Mere administrative
15 inconvenience plainly is not irreparable harm.⁹

16 Hynix's failure to carry its burden on these points should foreclose any relief from its
17 obligation to pay Rambus directly. But even if the Court were to conclude that payment into
18 escrow were an acceptable alternative to paying Rambus directly, under no circumstances should
19 Hynix be permitted to simply "accrue" its ongoing royalty obligations. In addition to the
20 shortcomings it shares with the escrow approach, Hynix's proposal of accrual also fails the third
21 and fourth prongs of *Standard Havens*.

22 As for the third prong, Hynix's own insistence [REDACTED]
23 [REDACTED] demonstrates that allowing Hynix to accrue has the potential to "substantially
24 injure" Rambus, 897 F.2d at 512. The only case Hynix has been able to identify in which an

25 ⁸ Indeed, although the Court need not reach the issue, Rambus does not believe that the royalty
26 payments would ultimately be subject to Korean tax at all because they are not Korean source
income.

27 ⁹ The threat of lost taxes is even less plausible with respect to the escrow approach (Mot. 17)
28 because escrow payments of this sort are not properly treated as a taxable event under Korean law
(Kwon Decl. ¶ 4), and therefore should not be subject to withholding at all.

ongoing infringer with a compulsory license was permitted to accrue royalties rather than pay them is *Voda v. Cordis Corp.*, 2006 WL 2570614 (W.D. Okla. Sept. 5, 2006).¹⁰ But when its facts are considered, *Voda* underscores, rather than undercuts, why Hynix cannot be allowed to accrue the royalties. In *Voda*, the plaintiff won a judgment that included ongoing royalties of apparently less than \$1 million a year from Cordis Corporation, a subsidiary of the medical industry giant Johnson & Johnson. *Id.* at *1, *4. The plaintiff sought to have Cordis pay into an escrow account, but Cordis opposed this motion on the basis of its sound fiscal health—noting, among other things, Johnson & Johnson’s \$50.5 billion in sales. (See Wu Decl., Ex. H (Cordis’ Opp’n to Voda’s Mot. for Entry of J., July 20, 2006).) The Court agreed, and held that Cordis could accrue royalty payments because there was no question of its ability to pay the money. *Voda*, 2006 WL 2570614, at * 6. Here, the royalty payments are orders of magnitude greater than they were in *Voda*, while Hynix is orders of magnitude smaller than Johnson & Johnson. [REDACTED]

[REDACTED] And there is every reason to think that Rambus will face difficulties collecting royalties from a foreign company. Accruing, like paying into escrow, is a way of securing the payments owed; it should be permitted only if it sufficiently protects the prevailing party, which it plainly does not here.

Finally, the fourth *Standard Havens* factor considers the “public interest” in granting a stay. 897 F.2d at 512. It is self-evident that permitting a proven patent infringer not only to continue infringing but also to pay nothing for doing so would offend, rather than promote, the “public interest.” *Id.*

In an alternative throwaway argument, Hynix asserts that Rambus may not simultaneously seek a permanent injunction on appeal *and* seek to enforce the royalty payments in the meanwhile because the two courses are “inconsistent.” (Mot. at 16-17.) Even setting aside the fact that this

¹⁰ Rambus has been unable to find any other cases reaching the same result as *Voda*. Hynix does cite *z4 Techs., Inc. v. Microsoft Corp.*, 434 F. Supp. 2d 437 (E.D. Tex. 2006), for the same proposition, but that case does not address accrual at all (and indeed it was cited by the plaintiff in *Voda* in opposition to defendant’s request to accrue). In *z4 Techs.*, the Court simply severed the claims for ongoing infringement into a separate action. *Id.* at 444. Here, the Court has already resolved the ongoing infringement issues in the Final Judgment. (Final Judgment at 3-7.) The case offers no guidance here.

1 argument is entirely premature (since Rambus has not filed any notice of appeal), the two courses
2 are complementary, not inconsistent. Unless and until Rambus can exercise its right to exclude
3 Hynix from practicing Rambus's inventions, Rambus's only recourse is to collect royalties. Even
4 if Rambus obtains a permanent injunction on appeal, with time left on the patent to enforce it, its
5 *only* means of collecting for Hynix's infringement between now and then is the royalties
6 arrangement. The sole authority cited by Hynix, *Enserch Corp. v. Shand Morahan & Co., Inc.*,
7 918 F.2d 462, 464 (5th Cir. 1990), simply suggests that one cannot seek two overlapping forms of
8 remedy: specific performance and payment for nonperformance. But the only way that
9 compulsory royalties and a permanent injunction would be overlapping would be if Rambus were
10 somehow excluding Hynix *and* collecting royalties *during the same time frame*; such a course is
11 not only "inconsistent," but logically impossible.

12 **IV. CONCLUSION**

13 The Court should reject Hynix's motion, direct it to post a full bond in accordance with
14 Rule 62, and order it to pay Rambus directly for its ongoing infringement of Rambus's patents.

15 DATED: April 10, 2009

MUNGER, TOLLES & OLSON LLP
SIDLEY AUSTIN LLP
McKOOL SMITH P.C.

18 By: /s/ Gregory P. Stone
GREGORY P. STONE

19 Attorneys for RAMBUS INC.